No. 11,906

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LeRoy Cowan,
Appellant,

vs.

Young Iron Works (a corporation),
Appellee.

BRIEF FOR APPELLEE.

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STATEMENT OF THE CASE.

This action was commenced in the Superior Court of the State of California in and for the County of Sacramento. Appellant attempted to obtain service upon appellee, a Washington corporation, pursuant to section 411 (2) of the California Code of Civil Procedure which reads as follows:

> "411. The summons must be served by delivering a copy thereof as follows:
> * * * * * * *
> (2) Foreign corporations, etc. If the suit is against a foreign corporation, or a nonresident joint stock company or association doing business in this State; in the manner provided by Section 406a of the Civil Code."

Upon petition of appellee, the action was removed to the United States District Court for the Northern District of California, Northern Division, by virtue of an order of the Superior Court. (Rec. 26.)

Appellee appeared specially, as it does now, for the sole purpose of challenging the jurisdiction of the Court over appellee and moved to quash the service of summons. (Rec. 27.)

Jurisdiction could only be obtained over appellee if at the time of the attempted service of summons, it was doing business in California as provided by Section 411 of the California Code of Civil Procedure, to which reference has been made above. Therefore it was, and is incumbent, upon appellant to prove that Young Iron Works, a Washington corporation, was present in California or engaged in such activities as to satisfy the California Statute. The Honorable Dal M. Lemmon, United States District Judge, held that appellee was not doing business in California and ordered that service upon appellee be quashed. (Opinion and Order, Rec. 31 to 36, incl.)

The material facts concerning appellee's business are shown in the affidavit of Paul J. Isaacson. (Rec. 18 to 22, incl.) No case has been cited in appellant's brief which holds that the transactions described by Mr. Isaacson constitute doing business in the State of California for the purpose of serving process or otherwise.

The facts stated by Mr. Issacson in his affidavit (Rec. 18 to 22, incl.) are uncontradicted. They are as follows:

Young Iron Works is a Washington corporation and has no office or place of business or employees, agents or sale organizations of any kind in California. Its only place of business is Seattle, Washington, where it is engaged in the manufacture of various mechanical devices used in the lumber industry. Its products are sold only from Seattle and shipped only from Seattle and the company has no stock of goods or parts in California nor on consignment, nor in storage there. All sales are made in Seattle, Washington. The company has one salesman who visits prospective customers in various western states approximately twice a year. This salesman resides in Seattle, Washington. He has no residence in California and has never established any office or place of business in California. All sales are made from Seattle, Washington, to independent dealers in California. No contracts are made with any dealers, nor does the company have any interest in any California dealership. Orders are generally sent by mail to the Seattle, Washington, office and are accepted and filled from Seattle. Dealers' customers buy direct for their own account. Young Iron Works retains no title or interest of any kind in goods shipped to customers. It furnishes no installation service or repair or maintenance service of any kind in California, or elsewhere. No stock or parts is maintained, in California or elsewhere. The company does no advertising, maintains no exhibits, displays or demonstrations in California. It has no interest in the resale of merchandise bought by independent dealers, nor any collections or proceeds of sales. No sales are made in California for the

account of the corporation or in which it has any interest.

Appellant attempted to meet the burden upon him, through the testimony, by depositions, of Albert S. Weaver, Jr., president of the Weaver Tractor Company (Rec. 51 to 84, incl.), and of Thomas H. Lynn, assistant sales manager of the tractor company. (Rec. 84 to 93, incl.)

The testimony of Mr. Weaver and of Mr. Lynn in no way contradicts the testimony of Mr. Isaacson. In fact, their testimony makes it perfectly clear that Weaver Tractor Company was an independent dealer buying merchandise in interstate commerce from Young Iron Works and many other corporations and that in no respect did the tractor company act in an agency or representative capacity.

The initiation of the dealership of Weaver Tractor Company came about through one of the Weaver employees attending a logging congress in Oregon and there seeing a display of Young merchandise. (Rec. 54, 58.) Weaver then arranged, as a dealer to purchase Young products for exclusive resale in the Sacramento trade area. As Mr. Weaver said (Rec. 55) "We buy it from them, sell it to the trade, and that is about it."

Frequent reference has been made in appellant's brief to the use of the word "representative." Mr. Weaver explained the use of that term in the trade as simply meaning the selling of a manufacturer's products. (Rec. 82.) The reference Mr. Weaver made

concerning an exclusive arrangement simply means that "they are the only dealers in a particular area who sell products of that manufacturer." (Rec. 83.) Mr. Lynn also testified to the same effect and said that reference to "their products" simply meant products manufactured by Young Iron Works, but which belonged to Weaver. (Rec. 90, 91.)

Concerning the single visit of a Mr. Isaacson from Young Iron Works at Seattle, Mr. Weaver said:

> "Oh, it was just one of those casual things. The gist of it was we liked the Young line, and they liked the sales that we were making of their products, and it was working out quite well with both sides, and everybody was very happy." (Rec. 75.)

It was also Mr. Weaver's testimony that Mr. Nelson, from appellee's factory at Seattle, visited the Sacramento area about twice a year and that he would stay a day or two but usually for only a matter of hours. (Rec. 80.)

Other facts testified to by Mr. Weaver in his deposition were these: Weaver Tractor Company sent mail orders to Young Iron Works at Seattle for merchandise. The orders were filled by Young in Seattle and were shipped from Seattle. Weaver was then billed for the merchandise. No goods were sent to Weaver on consignment. No orders for merchandise were given to Mr. Nelson, Young's representative. Young Iron Works had nothing at all to do with the business or activities of Weaver. (Rec. 81 to 83, incl.)

The United States District Judge Dal M. Lemmon had before him all of the facts contained in the present record and in his opinion (Rec. 36) said:

> "I hold that the facts disclose that defendant did not engage in the regular continued and sustained course of business in California necessary to constitute doing business there. Rather, its activities were casual or occasional."

ARGUMENT.

SUMMARY.

The sole question here is whether the District Court erred in holding that the appellee, a Washington corporation, was not engaged in any activity or activities in the State of California which would constitute "doing business" there within the meaning of subdivision 2 of Section 411 of the California Code of Civil Procedure.

There is no case cited by appellant in his opening brief or that we have been able to find which holds that the course of dealing which can be inferred from any of the evidence in this case constitutes doing business in California for the purpose of subjecting the appellee to the jurisdiction of the California Court. Those cases cited by appellant and to which reference will be made in the following pages, are clearly distinguishable and in all cases fall far short of showing that the interstate character of the business transacted by appellee is the kind or type contemplated by the California Statute. Therefore appel-

lant has found it necessary in his argument, particularly on pages 15 and 16 of his opening brief, to assume factually the very conclusion he wishes this Court to reach.

I.

THE YOUNG IRON WORKS WAS NOT ENGAGED IN ANY ACTIVITY IN CALIFORNIA WHICH GAVE RISE TO THE CLAIMED LIABILITY.

Appellant argues that the "presence within the state" is a discarded doctrine. This is only a play upon words. A corporation can never, in a real sense, be present in a state like an individual is present. It has to act through officers and agents. We submit, however, that even though for valid service of process (a) it is not necessary that the foreign corporation qualify for intrastate business; (b) nor necessary that it be subject to local state regulations, procedures, and licenses; (c) nor that it maintain an office or have a direct, tangible "presence" within the state; (d) nevertheless a corporation has to do something more than manufacture and ship its goods and send catalogs into a state in interstate commerce in order for it to have brought itself within the state or under the protection of the laws of the state to the point where it can be amenable in local Courts to claims of strangers because of alleged defects in an alleged product of the manufacturer where used by a remote purchaser who did no business with appellee anywhere, let alone in the State of California.

We do not find that the case of *International Shoe Company v. State of Washington,* 326 U. S. 310, upon which appellant so heavily relies, supports his position. That was a case where the State of Washington brought suit in the State Court to recover unpaid contributions to the State Unemployment Compensation Fund. The statute under which the suit was brought provides for unemployment compensation for employees, the cost of which is defrayed by contributions required to be made by employers to the State Unemployment Compensation Fund. International Shoe Company appeared specially and moved to set aside the order and notice of assessment on the ground that the service upon appellant's salesman was not proper service upon appellant and that appellant was not a corporation of the State of Washington and was not doing business within the state; that it had no agent within the state upon whom service could be made, and that appellant was not an employer within the meaning of the statute. However, the appellant employed 11 to 13 salesmen under the supervision and control of the home office at St. Louis and as stated by the Court at page 313 of the opinion:

> "These salesmen resided in Washington; their principal activities were confined to that state; and they were compensated by commissions based upon the amount of their sales."

The salesmen carried samples and rented permanent sample rooms for exhibiting samples. It was held that the regular and systematic solicitation of orders

in the state by appellant's salesmen resulted in a continuous flow of appellant's product into the state and was sufficient to constitute doing business in the state so as to make appellant amenable to suit in its Courts and that there were additional activities as well.

It should be noted that in that case the salesmen resided in the State of Washington, were permanently engaged in business there as immediate and direct agents of appellant, and received commissions for the sales they made in that state. The activity in which they were employed within the State of Washington gave rise to the liability for the unemployment compensation payments due the State of Washington. At page 320 of the opinion the Court said:

> "The obligation which is here sued upon arose out of those very activities," so that, "It is evident that these operations established sufficient contacts or ties with the state of the forum to make it reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which appellant has incurred there."

Based on the facts of the suit, we cannot see that this decision grants any authority to make appellee subject to process in California, where it does a purely interstate business and sells only to independent dealers and distributors who are not agents of the foreign corporation. At pages 316 and 317 of the opinion the Court emphasized that the terms "present" and "presence" are used merely to

> "symbolize those activities of the corporation's agent within the state which the courts will deem to be sufficient to satisfy the demands of due process."

The Court did not reverse or modify those decisions cited by it on pages 317 and 318 with respect to which the Court at page 317 said:

> "Conversely, it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there."

The language of the Court in the *International Shoe Company* case at page 320 of the opinion is also very significant. There the Court in referring to the standards adopted by it said:

> "Applying these standards, the activities carried on in behalf of appellant in the State of Washington were neither irregular nor casual. They were systematic and continuous throughout the years in question."

Appellant cites *Wooster v. Trimont Mfg. Co.* (Mo.), 203 S. W. (2d) 411, particularly with reference at page 413 of the opinion to an article by J. P. McBaine, in the California Law Review (34 California Law Review 331). The appellant can get no comfort out of this article. The author says the result in the *International Shoe Company* case is sound but points out that:

> "The liability enforced arose out of the acts done by the Shoe Company in the State of Washington." (34 California Law Review 340)

and then continuing says:

> "An action by a state against a foreign corporation to enforce a liability to contribute to its unemployment fund, where liability to contribute is based upon the salaries or commissions paid its agents engaged in the business of soliciting orders in the state for merchandise to be shipped into the state, would not have produced any difficulty for either the bench or the bar."

The author at page 336 of the review article says the "presence" theory and the "fair play and substantial justice theory" are both vague and unsatisfactory, and then goes on to say:

> "It is suggested that a proper and simpler solution of this important problem is to hold that an appropriate court of a state has jurisdiction of an action against a foreign corporation which arises out of acts done by its agent or agents which create liability or constitute a part of a series of acts which culminate in creating liability, provided due notice of the action is given. The suggested rule, if sound, cannot be condemned as a radical departure from accepted doctrine when it is borne in mind that originally the opinion prevailed that a corporation could only be sued in the state that created it."

Appellant, at page 19 of his brief, says the facts in *Wooster v. Trimont* (203 S. W. (2d) 411) are

"similar to those presented in this case." Actually, the facts in that case bear little resemblance to those in the case at bar. That was a suit brought in Missouri by a manufacturer's agent against the manufacturer, a Massachusetts corporation, to collect commissions. The facts as stated by the Court at page 412 of the opinion are these: The defendant company manufactured pipe tubes and wrenches at its factory in Massachusetts and sold only to the wholesale trade. Plaintiffs were manufacturer's agents and had an office in St. Louis, Missouri. Plaintiff and defendant entered into a contract in 1919 under which plaintiff was to take orders for the company's products on a commission basis. The contracts between the parties were renewed at intervals between 1919 and 1943. The company furnished their agent with catalogs, discount sheets, samples, sales data and information concerning the products of competitors. The company employed two men to call on the Missouri trade. The company directed their agent to place the company's name on the agent's office door and to put the company's name in the St. Louis telephone directory and in the St. Louis post office directory. The company permitted the agent to use a letterhead bearing the company name. Many business letters were addressed to the company at the agent's office in St. Louis. The company name appeared on the building directory. The company held salesmen's meetings in St. Louis. The agent adjusted complaints for the company and collected accounts. Customers' orders were addressed to the company at the agent's address.

We submit that the foregoing facts go considerably beyond anything found in the present case.

There were no acts of Young Iron Works in California giving rise to any claimed liability.

Respondent is naturally interested in the success of its California dealers and the acceptability of its product, BUT respondent does not distribute or promote through agents or in anyway act under the protection of the California law. In the *International Shoe Company* case, the Court said at page 319 of the opinion (326 U. S. 310) that foreign corporations who have the benefit of the protection of state law and government in the course of their activities should be amenable to legal process and to suit in such state, "so far as those obligations arise out of or are connected with the activities" which are carried out under the protection of such state laws.

None of respondent's relationships with its dealers in any one respect or in the aggregate is asserted under the benefit or protection of the laws of California, nor are there any obligations arising here that can be deemed connected with any activities of respondent in the State of California.

Factually, appellant claims injuries arose while he was employed by some logger who in turn bought, either from the dealer or someone else, the device which that dealer in turn had purchased from respondent, a foreign manufacturer. Appellant is utterly remote from any activity or transaction of appellee who has made an interstate sale of goods to a

dealer who purchased in Seattle goods to be shipped to California for resale at the option of the dealer.

Legally, appellant errs in assuming that any foreign corporation, whose manufactured goods are bought by California dealers and resold in California, is in California for purposes of jurisdiction of California Courts because the manufacturer gives the dealer preferential territory, catalogs and ordinary decency in business relationships.

In times past, dozens of criteria have been emphasized by the Courts as sufficient or insufficient, singly or together, to authorize process against a foreign corporation and from time to time, with the development of the economy of the country and innovations and expansion in business methods the attitude of the Courts has changed concerning the relative significance of these criteria; BUT none of the Courts has yet adopted appellant's theory that there is no mark of distinction between when a foreign corporation is amenable to local process and when it is not. The determination is not a matter of what might momentarily seem to be a good idea or the impression of the Court.

The determination as to when the process is valid is still to be based on the facts of the case and these facts have to show in the aggregate such a presence or activities within the state that the foreign corporation can be deemed to have submitted itself to the jurisdiction of that state or had the benefit or sought the use of its laws and protection. True this does not

have to go so far as to qualify the corporation to do intrastate business, but there has to be some direct activity of the foreign manufacturer within the state. Here respondent had no direct activities in the state, kept no stock of goods, serviced no property there, kept no samples there, maintained no office there, had no staff or employees there, no commission agent or salesman even lived within the state, and all business was handled in and out of Seattle exclusively.

At the most, respondent afforded its dealers in California preferential or "exclusive" treatment in their own geographical area, supplied them with some literature and occasional counsel and suggestions. The products of respondent are sold in California solely and exclusively as the direct and sole sales of such dealers or other owners of those products as may have the same.

Even if appellant was injured by the breaking of a swivel manufactured by appellee, the cause of action, if any, did not arise out of any of the activities of appellee in the State of California. As Mr. Weaver testified (Rec. 81), the manufactured product of Young was bought on requisition mailed to Seattle where the product was manufactured. The goods were then shipped in interstate commerce to Weaver Tractor Company at Sacramento and the tractor company was then billed through the mail. Weaver Tractor Company was an independent dealer and appellee had no control over its business. Sales made by Weaver were on its own account. Thus, if a Young swivel

were sold to a logging company employing the appellant, not only would Young have no connection with appellant, but neither would Weaver. At any rate, no activity of the Young Iron Works within the state gave rise to the claim of liability which is asserted in the complaint in this case. Thus the test of "activity giving rise to the claim of liability" is not met by the facts in the case at bar.

II.

WHETHER A FOREIGN CORPORATION IS "DOING BUSINESS" SO AS TO MAKE IT AMENABLE TO PROCESS OR TO STATE REGULATIONS IS A QUESTION OF FACT.

Appellant again errs in saying the District Court overlooked the distinction of doing business, so far as service of process is concerned, and submitting to state regulation. The District Court found factually here that respondent was not in California sufficient for the service of process on it.

In this connection, it is interesting to note the case of *Minnesota Mining & Mfg. Co. v. International Plastic Co.,* 159 Fed. (2d) 554. This was decided subsequent to the *International Shoe Co.* case and quoted extensively from that case, and then said on page 564:

> "Whatever applicability, if any, this case may have on the question now before us, it certainly establishes the proposition that the 'boundary line between those activities which justify the subjection of a corporation to suit, and those which do not' is a question of fact."

The "service" attempted to be made by the appellant here is pursuant to a California statute, which by its own terms is applicable to corporations actually and actively doing business in California.

No "service" was ever attempted to be made on any salesman or representative of appellee deemed to be in the State of California and carrying on its affairs actively there.

Note that in the *International Shoe Co.* case, relied on by appellant, the service there sought to be sustained was made by (a) registered mail to the home office of the company and (b) personally upon resident sales agents who were permanently residing in the state, with display samples maintained there on a semi-permanent basis.

Reference is made by appellant to the case of *McMillan Process Co. v. Brown,* 33 Cal. App. (2d) 279, 91 Pac. (2d) 613, which was cited by the District Court in its opinion. That was a case in which the right of the plaintiff foreign corporation to bring an action in the California Court was challenged on the ground that plaintiff was doing business in California but had not complied with the laws there. The Court in that case reviewed the facts concerning the activities of the plaintiff corporation in California and held they were not sufficient to constitute doing business in the sense that the corporation was engaged in intrastate business. In that case the plaintiff corporation and the defendant entered into a contract under which defendant was given the right to use, in California, a certain patented machine for defiberizing

wood. The contract provided for the delivery of additional machines.

The title to the machines was retained by the corporation. Payments for the use of the machines were to be made on a royalty basis. The corporation was to have access to defendant's books, records, shipping documents, memorandums, and other data kept by the defendant in conducting his business. The corporation was given the right to repossess the machines in case of default. The president of the corporation went to California for the purpose of making certain changes in the machines for purpose of making them operate properly.

The determination of the problem in the *McMillan* case was purely factual as it is in the instant case, and as it is in all cases involving the question of what constitutes doing business and whether for the purpose of making a foreign corporation amenable to process or subject to state regulation or otherwise.

In *Liquid Veneer Corp. v. Smuckler* (9th C. C. A.), 90 Fed. (2d) 196, the Court found that the corporation was amenable to process under the facts stated at page 200 of the opinion as follows:

> "There can be no doubt that the defendant, at the time and prior to service upon it by serving the Secretary of State, shipped merchandise in bulk and warehoused it in San Francisco for present and future use in filling its orders; that from the San Francisco stock shipments were made to Los Angeles to fill orders and that orders were immediately filled from the stock kept in California."

In *State v. Ford Motor Company* (S. C.), 38 S. E. (2d) 242, the Court after reviewing the facts concerning the extensive operations of the Ford Motor Company in the State of South Carolina, and after reviewing a number of decisions dealing with the various phases of "doing business", at page 251, of the opinion, said:

> "Consideration of the foregoing authorities * * * is convincing that under the evidence adduced and the facts found in the case, appellant was doing business in South Carolina amply sufficient to subject it to the jurisdiction of the court at the time of the commencement of this action and render applicable to it the statutory provision for service which was followed; * * *"

The Court then went on to show that as a factual situation the Ford Motor Company was not engaged in intrastate business.

Appellant cites the case of *Thew Shovel Co. v. Superior Court,* 35 Cal. App. (2d) 183, 95 Pac. (2d) 149, and in quoting from page 185 of the opinion has omitted from his quotation the following significant sentence:

> "The facts of each case must meet the requirements essential to obtain jurisdiction under the applicable statute."

That is precisely what the District Court did in the instant case. The opinion of the Court (Rec. 31 to 36, incl.) clearly shows that the Court examined the facts for the purpose of determining whether the Young

Iron Works was amenable to process and for no other. Certainly the Court committed no error in doing so.

III.

THE YOUNG IRON WORKS WAS NOT ENGAGED IN ANY ACTIVITIES IN THE STATE OF CALIFORNIA WHICH MADE IT AMENABLE TO PROCESS.

Appellant urges that respondent here participated in California activities by soliciting orders and furthermore that that solicitation of orders has been augmented by other activities. In the *International Shoe Company* case the augmentation of the point about solicitation of orders consisted of two very specific matters not present in this case: (a) Display samples were maintained in permanent sample rooms for exhibiting samples in business buildings or in rented rooms in hotels or business buildings temporarily for that purpose. The cost of such rentals was reimbursed by appellant; (b) the salesmen were actually residents and had been for years in the State of Washington and actively solicited sales as agents of International Shoe Co. on a commission basis. At page 320 of the opinion in the *International Shoe Co.* case, it is noted that the activities of International Shoe Co. were not irregular or casual, but it was constantly and actively doing business in the state.

It is particularly noted about the *International Shoe Co.* case that there the corporation was seeking to escape accountability in the Washington Courts

for unemployment compensation tax based on payrolls with reference to salesmen employed by the corporation, who regularly and permanently resided in the State of Washington and who were actively and continuously on business there with displays and samples maintained in the state at all times. The obligation sought to be enforced against International Shoe Co., therefore, was the kind of an obligation that directly arose out of and was connected with the activities of the corporation that were within the State of Washington.

In other words, the tax which the State of Washington sought to impose through the Court proceedings and administratively through the Department were obligations incident to payrolls of persons whose activities specifically were in the State of Washington. The only excuse sought for claiming the corporation and those employees were not in the State of Washington was that their business pertained to interstate commerce. Obviously, the fact that the business *pertains* to interstate commerce is not of itself sufficient to prove whether a corporation is or is not present within the state, in the sense that it has made itself amenable to local process.

In *Frene v. Louisville Cement Co.,* 134 Fed. (2d) 511, the activities of the corporation's agent in the District of Columbia went far beyond mere solicitation. The defendant cement company was a Kentucky corporation. It was in the business of selling cement and cement products. The company agent resided in Chevy Chase, Maryland, a suburb of Washington. He

was a graduate engineer and spent "two thirds to three fourths of his time in Washington" which he said was the biggest market in his territory. The agent visited construction jobs where his company's products were being used and would aid the contractors in their construction problems. He took specimens of work to the government agents for the purpose of obtaining government approval. During the particular construction job involved in that case the agent inspected the work as it progressed and saw that the cement products were properly mixed, and was being properly spread, and was being used in the manner intended by the company. The agent carefully examined the plans and specifications, visited the work regularly while in the course of construction, and pointed out minor and major details to the brick masons. On many jobs the agent used his engineering ability to aid in construction work. The agent was also to work with various government agencies and departments toward the end that his company's products would meet the government specifications. The agent aided in preventing and clearing up misunderstandings and difficulties arising in the course of the performance of his company's contracts. The agent's activities there went far beyond the casual visits of appellee's representative.

An interesting case, which reviews the principal authorities upon the subject and which was decided after the *International Shoe Co.* case and with that case in mind, is *McWhorter v. Anchor Serum Co.*, 72 Fed. Sup. 437. This was decided in the United

States District Court, Western District of Arkansas. There a Missouri Corporation employed a salesman, residing in Arkansas, upon a monthly salary and expense account to act as veterinary representative. It was the duty of the salesman to call on druggists and dealers with the idea of selling the products of the Missouri company. Orders were sent to Missouri and in all cases shipped directly to the dealer. Jurisdiction was challenged. The Arkansas statute authorized service of summons upon the Secretary of State on behalf of foreign corporations "who shall do any business or perform any character of work or service in this state." It was held that a Missouri corporation which had no wholesalers or stock of goods in Arkansas, but merely a soliciting agent to secure orders which were filled outside the state and the goods shipped directly to purchasers, was not "doing business" in Arkansas within the Arkansas statute providing for service of process on foreign corporations.

In *Creamery Package Mfg. Co. v. State Board of Equalization,* 166 Pac. Rep. 952 (Wyo.), the State of Wyoming attempted to collect a sales tax against an Illinois corporation which had sold machinery to customers in the State of Wyoming in interstate commerce. A salesman of the company occasionally travelled through the state to take orders. He had no headquarters in Wyoming, but lived in Denver. Orders were subject to approval by the corporation at its Denver office. Goods were shipped f.o.b. from the Illinois or Colorado office. Sometimes the cor-

poration, if requested, supervised installation of equipment, but the actual installation was made by men engaged by the purchaser. It was held that the supervision of installation was merely incidental to interstate commerce and did not constitute doing business in the State of Wyoming and that the activities described above did not constitute, "the doing, carrying on, transacting or engaging in business in the State of Wyoming" within the meaning of the statute, therefore attempted service upon an agent of the corporation in the State of Wyoming was void. In that case, the Supreme Court of Wyoming discusses and distinguishes the *International Shoe Co.* case, which had been previously decided.

Another later case in which *International Shoe Co.* case was discussed is the case of *Ladd v. Brickley,* 158 Fed. (2d) 212, where at page 218, the Court said:

> "Paper Company has ceased to do local business in Massachusetts. It does have representatives there who solicit offers from Massachusetts prospects looking to transactions which are completed by the shipment of goods in interstate commerce. The Massachusetts court has said that such solicitation is not such doing of business in Massachusetts as to make a foreign corporation subject to suit there. We now know that systematic canvassing by travelling salesmen who solicit offers for interstate sales can constitutionally subject the employing company to liability for a state's unemployment compensation fund. That is not the same thing as saying that a law suit may be pursued against the foreign

corporation under the same set of facts. But here the fact that the state court has ruled that such solicitation does not constitute doing business on which to found suit settles the question adversely to the plaintiff and the foreign corporation seeking to evade litigation in that state does not need to try out the question of its constitutional protection against such litigation. It looks, therefore, as though the current activities of Paper Company in Massachusetts form no basis for holding it amenable to suit in Massachusetts courts. The significance of its past activities has already been discussed above."

The same result, in substance, was registered by the United States District Court for the Southern District of New York at page 836 of its opinion in a case decided November 12, 1946, entitled *Ladaas v. Canister Co.,* 69 Fed. Sup. 835.

Another interesting decision is by the Circuit Court of Appeals, Second Circuit, by Judge L. Hand in the case of *Bomze v. Nardis Sportswear, Inc.,* 165 Fed. Rep. (2d) 33. At page 35 of the opinion Judge Hand said, regarding the *International Shoe Co.* case:

"The Supreme Court there declared that the corporation's 'presence' was to be determined by balancing the opposed interests: The convenience of the obligee against the burden upon the corporation. That is a test not different in kind from that which has been repeatedly used when the inquiry is whether it will 'unduly burden' interstate commerce to fetch a corporation, engaged in such commerce, from the place of its principal

> activities to defend the action. If that be the test, the question at once becomes relevant whether the action is based upon a liability arising out of the local activities; for it is almost always less burdensome to subject a corporation to the defense of actions so arising than to those arising elsewhere."

and continuing on page 36 said:

> "Nevertheless, we hesitate to say that the New York courts will occupy the new enclave, now opened to them by International Shoe Co. v. Washington, supra; and, until they do, we see no other course but to compare the facts in the case at bar with those which existed in the bellwether decisions of the state, and to appraise—a more candid word would be to guess at—the importance of any differences. This we shall try to do."

The Court finally held, on page 37, that the corporation was doing enough business in New York to satisfy the state decisions and that since the cause of actions arose, at least as to New York sales, "out of those activities which made the corporation present, any federal question is set at rest."

In that case, the corporation employed agents in New York "to solicit orders and to further the sale of" women's sportswear garments. The orders were subject to the approval of the home office, but the agents were obligated to maintain a show room for the display of goods and to employ their own assistants. They were to receive a commission and an expense allowance for the maintenance of the show

room. These agents employed additional salesmen, maintained an office and office help. They paid local taxes, had telephone service, etc. This, of course, clearly constitutes doing business, but the case is cited to show the discussion of *International Shoe Co.* case, upon which appellant so completely relies.

On page 27 of appellant's brief, a very broad statement is made that there are many decisions holding "That the selection of dealers or the creation of distributorships was sufficient to constitute doing business for purposes of process." Then certain cases were cited. An examination of each and every case will show that none of them support the above statement. Moreover, there are many quotations from appellant's brief which, when compared with the facts of the case from which the quotation is taken, are found to have no application to the case at bar. As Judge Lemmon, United States District Court Judge, said in his opinion and order (Rec. 31, 35):

> "Often an announced legal principle is misleading when torn from its moorings. Generalization must be evaluated in the light of the circumstances which gave them expression."

With reference to the cases cited on page 27 of appellant's brief, we find the following:

The case of *Vilter Mfg. Co. v. Rolaff,* 110 Fed. (2d) 491, simply held that a foreign corporation operated in Missouri through a sales representative. This agent had an office in St. Louis. The name of Vilter Manufacturing Company was on the door. The company

had its name in the telephone directory of St. Louis and in the building directory where the office was located. It had another office in Kansas City. The sales representative was not an independent dealer, buying and selling for his own account, but an actual agency representative. The company had a representative who was consulted on technical matters of installation, adjusted complaints, and actually assisted in the supervision of installation jobs. The company hired local labor in Missouri to attend to installations. Payments were received at the St. Louis or Kansas City office, as the situation might be, and remitted to the home office in Milwaukee. The company received correspondence at the St. Louis office. Offers were made by the agent in the company's name and the company accepted offers directed to St. Louis. This reflected a long-continued course of business in the state. The above, of course, bears no manner of resemblance to the case at bar.

In *Carroll Electric Co. v. Freed Eisemann Radio Corp.,* 50 Fed. (2d) 993, the question was whether the foreign radio manufacturing corporation was doing business in the District of Columbia. It was held that the foreign corporation and the so-called distributor were in fact and law principal and agent and that the distributor was not an independent merchant in control of his own business. The foreign corporation was doing business in the District of Columbia through this agent and was properly before the Court.

In *Bendix Home Appliances, Inc. v. Radio Accessories Co.,* 129 Fed. (2d) 177, the Court held that the

contract was not a pure sales contract, but that it had characteristics of agency and of factorage contracts. In addition, the foreign corporation sent employees into Nebraska who inspected and repaired defective machines in the hands of users in that state, gave demonstrations to owners of machines, and to the employees of Radio Accessories Co., the distributor agent, of the proper operation and maintenance of the machines. The foreign corporation made good the warranty covering the machines to individuals purchasing laundry equipment in Nebraska and that was the activity of Bendix and not the distributor. We are unable to see why this case should have been cited at all, because the jurisdictional issue was not squarely presented in the Appellate Court, Circuit Court of Appeals, Eighth Circuit. The Court at page 181 of the opinion said:

> "But since the testimony at the trial was not brought into the record, we must assume that the evidence in the case was sufficient to support the decision of the lower court on the question of jurisdiction."

In *La Porte Heinecamp Motor Co. v. Ford Motor Co.,* 24 Fed. (2d) 861, the La Porte company was a dealer handling Ford automobiles. The cars purchased from Ford were shipped on sight draft with bill of lading attached or driven into Maryland. A traveling representative of Ford would go into Maryland and call upon the dealers to see that they were carrying on the business in a proper manner and that service was furnished to the public. He would call

upon and inspect the place of business, rendering service and making repairs. He would instruct and stimulate the dealers. At page 862 of the opinion in that case, the Court said:

> "Thus stated, his activities may seem to be so small a part of defendant's business that it would be incorrect to say that Ford Motor Company is doing business in Maryland, as that phrase has been interpreted by the state and federal courts."

But the representative of Ford Motor Company had more active duties than above described. He spent on the average five days a week in Baltimore, calling upon the dealers and service stations "constantly" and exercising "an intimate supervision and control of their business." This agent or traveling representative would make collections in the state and this was a regular part of his duties. He would advertise the Ford car and accessories and he would adjust disputes between dealers in Baltimore and elsewhere throughout Maryland. It was held that the agent not only solicited and obtained business within the State, but made collections, exercised constant and intimate supervision of the details of the business of the dealers, and that his manifold duties and activities constituted a substantial part of the company's business in Maryland.

Knapp v. Bullock Tractor Co., and *Vance v. Chicago Portrait Co.,* 242 Fed. 543, were decided together. In each of these cases jurisdiction over the foreign corporation was questioned. The same general questions of law were presented. In the *Bullock Tractor*

case, an Illinois corporation was selling farm tractors in California through *resident* sales agents who were given exclusive territories and were required to solicit and procure orders. They were not independent dealers. They were required to receive shipments of goods to deliver, set up and start each machine sold, instruct the purchaser how to adjust it, and to be responsible for all tractors purchased. Orders taken by these agents for machines provided that they were not valid until accepted by the company and they contained a warranty and agreement to furnish free of charge any part proving defective within one year. The company also agreed to furnish a supply of repairs of spare parts. It was held that the corporation was doing business in California.

Reference has been made in the instant case to the replacement of parts. There has been no replacement of parts by the appellee. In case of defective equipment, Weaver Tractor Company could make a claim to Young Iron Works, and the Young Iron Works, if it allowed the claim, would give Weaver a money credit. Young Iron Works had no connection with or relation to the buyer of equipment from Weaver and made no installations or adjustments and performed no service.

In the *Chicago Portrait Co.* case, an Illinois corporation carried on the business of enlarging portraits and selling frames under a system of contracts providing for the employment of district managers, road managers, solicitors, etc., to secure orders. It had a road manager in California who had general super-

vision of the soliciting and securing of orders and of the work of the salesmen, and this man was required to devote his entire time to the business of the corporation in California. In other words, this corporation actually did engage in business in California by and through agents, salesmen and managers and the case bears no resemblance to the case at bar.

Plaintiff's counsel places much reliance in the case, *Thew Shovel Co. v. The Superior Court of the City and County of San Francisco,* 35 C. A. (2d) 183, 95 Pac. (2d) 149. In that case, where the shovel company, a foreign corporation, was held to be doing business in the State of California, the following facts were present:

(1) The manufacturer granted the distributor an exclusive right to sell, subject to the reservation allowing the manufacturer to deal direct with the customers and particularly with the right to sell to (a) governmental bodies and subdivisions; (b) other large users, and (c) purchasers for export;

(2) The sales prices and conditions of sales made by the distributor were fixed by the manufacturer;

(3) All sales to be consummated in California subject to the approval of the manufacturer;

(4) Sales contracts of the distributor were to be assigned to the manufacturer as security;

(5) Distributor authorized to receive and remit to the manufacturer notes and initial payments;

(6) Manufacturer retained title to consigned goods;

(7) Manufacturer reserved right to withdraw consigned goods to fill orders elsewhere;

(8) Sales contracts and goods sold on consignment to be assigned to manufacturer;

(9) Notes on account of deferred payments taken in distributor's name, but endorsed over to manufacturer;

(10) Manufacturer agreed to advertise its products;

(11) Manufacturer agreed to furnish printed matter to distributor for distribution;

(12) Manufacturer agreed to furnish engineer for installation service;

(13) The distributor was to collect down payments, assist in collecting installments, remitting to the manufacturer such amounts as were due;

(14) Distributor agreed to furnish at least one salesman for that work (collections);

(15) Replacements of defective parts made by distributor who returned the defective parts to manufacturer, who then gave credit to distributor;

(16) Distributor required to make weekly report to manufacturer of all prospects and of the status of transactions;

(17) Manufacturer provided in the contract that reason for requiring acts to be done in that particular fashion was to avoid status of "doing business in California".

Obviously, the activities of Young Iron Works fall far short of those before the Court in the *Thew Shovel* case.

It must be constantly kept in mind that the cases upon which appellant relies are *those in which actual agency existed as a fact and the foreign corporation's agents were present in the state in person and conducted activities therein as a regular and systematic course of business.*

Here, the appellee sustained the ordinary relationship of manufacturer in one state selling to an independent dealer in another, the manufacturer making casual and brief visits upon the dealer at infrequent intervals. Weaver Tractor Company was not in any respect under the control or direction of Young Iron Works. If there is any basis in this record for holding that Young Iron Works was doing business in California, then there is no such thing as pure interstate commerce and every foreign corporation could be sued in a state in which its products were sold by an independent dealer or distributor. Such is not the law and such was not the holding of the Supreme Court in the case of *International Shoe Co. v. Washington,* 326 U. S. 309, upon which appellant heavily relies.

In conclusion, appellee respectfully submits that the order quashing the service should be sustained. Neither under the presence theory nor the corporate activity giving rise to the claimed liability theory nor upon the substantial justice theory can this service

be sustained. The corporation was not doing business in the State of California nor engaged in any activity there that would warrant its being subjected to process in the State of California.

Dated, Sacramento, California,
August 27, 1948.

Respectfully submitted,
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